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# MENTAL STRESS CLAIMS IN NORTH DAKOTA: EVALUATING THE COMPENSABILITY OF MENTAL STRESS CLAIMS UNDER NORTH DAKOTA WORKERS' COMPENSATION LAW

## I. INTRODUCTION

The increase in the number of mental stress claims has been one of the most significant developments in the workers' compensation system over the past two decades.<sup>1</sup> While the incidence of traditional physical injury claims has stabilized, the number of mental stress claims has exploded.<sup>2</sup> At any given time, between fifteen and thirty percent of our nation's workers suffer from "diminished efficiency as a result of some type of mental or emotional dysfunction."<sup>3</sup> Recent studies indicate that seven out of every ten workers suffer stress-related health problems.<sup>4</sup> According to the National Institute for Occupational Safety and Health, sixty to eighty percent of all industrial accidents are stress related.<sup>5</sup> The annual cost of mental stress to American industry, resulting from high turnover, low productivity, and increased medical costs, is in excess of \$100 billion.<sup>6</sup>

Various changes that have taken place in contemporary society are closely related to the increased frequency of mental stress claims.<sup>7</sup> "Mental stress experts" have identified numerous reasons for the dramatic increase in mental stress claims, including the mechanization and dehumanization of the workplace, increased

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1. 1B ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 42.25(a), at 7-957 (1991). The largest increase in mental stress claims has involved claims in which there has been no physical injury to the worker. *Id.* § 42.25, at 7-958. The number of mental stress claims in California has more than tripled since 1980. *Id.* In California, an estimated 17% of all "lost time injuries" are caused by mental stress. *Id.* See also Nancy Blodgett, *Legal Relief from Tension: Work-Induced Stress Spurs Workers' Comp Claims*, A.B.A. J., Oct. 1, 1986, at 17. Although mental stress claims only represented 4.7% of the total claims presented in 1980, by 1983 that percentage had doubled. *Id.*

2. Blodgett, *supra* note 1, at 18.

3. McGarrah v. State Accident Ins. Fund, Corp., 675 P.2d 159, 169 (Or. 1983) (citing *When Stress Becomes Distress: Mental Disabilities Under Workers' Compensation in Massachusetts*, 15 NEW ENG. L. REV. 287, 304 (1980)).

4. *Stress Exact's A Toll In Workplace, Study Says*, MIAMI HERALD, May 8, 1991, at 5b. In a survey performed by Northwestern National Life Insurance Co., 33% of surveyed workers indicated that they would "burn out" in the foreseeable future. *Id.* The survey further indicated that 34% of the workers had considered quitting their jobs because of employment stress and another 14% had actually quit or changed jobs in response to stress. *Id.*

5. Albert Millus, *Ferretting Out Fraud*, BEST'S REV. PROP. CASUALTY INS. EDITION, Workers' Comp. 88, at 54 (1988). While early stress claims were almost exclusively heart attack claims, mental stress claims have expanded to include many other "occupational disease claims." *Id.* at 60.

6. Blodgett, *supra* note 1, at 18.

7. *Id.* at 17.

productivity requirements, and inadequate and stifling organizational structures.<sup>8</sup> The introduction of computers into the workplace has further inflated stress levels by increasing the expectations and scrutiny placed upon each worker's performance.<sup>9</sup> The stalled economy is another factor that has impacted stress levels, forcing victims of job cuts to seek inferior employment and placing additional burdens upon those who survived the cuts.<sup>10</sup>

While stress levels in the work environment have risen, outside "stress buffers" and social support groups have diminished in importance and effect.<sup>11</sup> Since 1973, the amount of leisure time enjoyed by the average American has eroded from twenty-six hours to seventeen hours weekly.<sup>12</sup> During that same time period, the time spent on work-related activities has increased from forty-one to forty-seven hours.<sup>13</sup>

Greater public awareness and acceptance of mental disorders has also contributed to the expansion of mental stress claims by reducing the stigma attached to mental injuries.<sup>14</sup> The number of mental stress claims has been further increased by the public's

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8. *Id.* According to Dr. Paul Rosch, president of the American Institute of Stress, major sources of stress at work include:

- Insufficient time to get work done to one's satisfaction.
- Lack of a clear job description or chain of command.
- Absence of recognition or reward for good job performance.
- High level of responsibility with little decision making authority.
- Inability or lack of opportunity to voice complaints during daily activities.
- Prejudice and bigotry due to sex, race or religion.
- Inability to work with superiors or subordinates because of basic personality differences, goals and values.
- Unpleasant or dangerous workplace conditions.
- An organizational climate which stifles expression of emotions or consistently suppresses the ego.
- Constant and uncontrollable change and variability in the job or workplace.
- Frequent travel over time zones, or shift work that causes a disruption of normal biological rhythms and family life.
- Job insecurity.

*Id.*

9. Katherine Griffin, *Karoshi in America*, SAN FRANCISCO CHRON., June 30, 1991, at 11z. While computers have eliminated many menial tasks, they have also increased expectations that the employee's work will be completed faster. *Id.*

10. *Id.* Six million "middle managers" and "well-paid blue-collar workers" lost their jobs in the 1980s. *Id.* In addition, over half of the jobs created in the last decade pay less than \$12,000 annually, "the poverty level for a family of four." *Id.*

11. Blodgett, *supra* note 1, at 17. Dr. Paul Rosch notes that unlike previous eras, we no longer have "strong social support groups and family ties are much less distinct." *Id.*

12. Griffin, *supra* note 9. Persons ranging in age from 30 to 49 have been hardest hit by the time squeeze. *Id.*

13. *Id.*

14. *Id.* See also 1B LARSON, *supra* note 1, § 42.24(a). The majority of mental stress claims are filed by workers under the age of 50. *Id.* § 42.24, at 7-958. Women file more stress claims than men and 66% of the mental stress claims are filed by white-collar workers. *Id.*

reliance on workers' compensation as a replacement for disappearing employee health care programs.<sup>15</sup>

As a result of the expansion and recognition of mental stress, different types of mental stress claims have emerged.<sup>16</sup> Courts and commentators have divided mental stress claims into three categories: (1) physical injury causing mental stress injury—physical-mental; (2) mental stress causing physical injury—mental-physical; and (3) mental stress causing mental injury—mental-mental.<sup>17</sup>

This Note will define and differentiate the three types of mental stress claims and evaluate the compensability of each category of mental stress claim in North Dakota. In Part II, the Note will review the background and statutory coverage of workers' compensation in North Dakota. In Part III, this Note will examine the development of physical-mental claims. Part IV will examine the expansion of mental-physical claims in North Dakota and the legislative limitations placed upon those claims. The development of the mental-mental claims will be reviewed in Part V. Next, mental-mental claims will be evaluated subject to the same restrictions that are imposed on mental-physical claims in North Dakota. Finally, this Note will consider whether compensating workers for mental stress injuries is consistent with public policy and purposes of workers' compensation.

## II. WORKERS' COMPENSATION IN NORTH DAKOTA

### A. BACKGROUND

Workers' Compensation is a unique combination of social insurance and tort law.<sup>18</sup> The result is a social mechanism that

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15. *Risk Management Executives' Top Concerns Are Damage Caps & Health Costs, Survey Finds*, BNA, Mar. 30, 1992, at A-30.

16. ALBERT J. MILLUS & WILLARD J. GENTILE, *WORKERS' COMPENSATION LAW AND INSURANCE*, at 97-99 (2d 1980).

17. See 1B LARSON, *supra* note 1, § 42.20; MILLUS & GENTILE, *supra* note 16, at 97-99 (defining physical-mental cases as "psychosomatic" and mental-mental cases as "psychopsychic"); Lawrence Joseph, *The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective*, 36 VAND. L. REV. 263, 287 (1983); Thomas S. Cook, *Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application*, 62 NOTRE DAME L. REV. 879, 896-97 (1987); See also *Pathfinder Co. v. Industrial Comm'n*, 343 N.E.2d 913, 917-18 (Ill. 1976); *Townsend v. Marine Bureau of Pub. Safety*, 404 A.2d 1014, 1016-17 (Me. 1979); *Deziel v. Difco Lab., Inc.*, 268 N.W.2d 1, 9 (Mich. 1978).

18. 1 ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 1.20, at 2 (1990). Professor Larson observes:

Workmen's compensation is fundamentally different from strict tort liability in its basic test of liability—work connection rather than fault; in its underlying philosophy—social protection rather than righting a wrong; in the nature of the injuries compensated; in the elements of damage; in the defenses available; in

provides benefits to the victims of work-related injuries.<sup>19</sup> Prior to the enactment of workers' compensation statutes, an injured worker's sole recourse was to pursue largely ineffectual tort remedies.<sup>20</sup> The system is funded by employer-paid insurance premiums, the cost of which is passed to the consumer as increased product cost.<sup>21</sup> Thus, under workers' compensation the public as a whole, rather than the individual worker, is burdened with the cost of work-related injuries.<sup>22</sup>

Workers' compensation acts share at least eight common factors: (1) employees who suffer injuries arising out of and in the course of employment are entitled to guaranteed benefits; (2) recovery is granted regardless of the employee's fault or the employer's innocence; (3) coverage is extended solely to employees to the exclusion of independent contractors; (4) benefits available include compensation for wage loss and medical expenses to the injured employee and death benefits to dependents; (5) employees relinquish their common law right to sue their employers in exchange for modest but certain compensation for their injuries; (6) the right to proceed against third parties is retained by the employee; (7) administrative agencies or commissions oversee the operation of the workers' compensation system; and (8) the system is funded by employer-paid insurance premiums.<sup>23</sup>

The first workers' compensation act was passed in North Dakota in 1919<sup>24</sup> as a part of a nationwide movement to protect employees from increased industrial accidents and decreased availability of common law tort remedies.<sup>25</sup> The remedial purpose

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the amount of compensation; in the ownership of the award; and in the significance of insurance.

19. *Id.* § 2.00 at 5.

1 LARSON, *supra* note 18, § 1.00, at 1. See also MILLUS & GENTILE, *supra* note 16, at 46. Workers' compensation requires that employers carry insurance or qualify as self-insurers, guaranteeing the availability of benefits to injured workers. *Id.*

20. See 1 LARSON, *supra* note 18, § 4.00-4.30, at 23-28. The availability of common law tort remedies to the employee was extremely limited. *Id.* Employers could avoid liability through the defenses of contributory negligence, assumption of risk and the fellow servant rule. *Id.* As a result, the cost of the vast majority of workplace injuries was placed upon the employee. *Id.*

21. See N.D. CENT. CODE § 65-04-04 (1985 & Supp. 1991) (providing employers' obligation to purchase insurance and participate in the workers' compensation system).

22. 1 LARSON, *supra* note 18, § 1.10, at 2.

23. *Id.* § 1.10, at 1-2. See also MILLUS & GENTILE, *supra* note 16, at 45-51 (providing a basic general background to workers' compensation).

24. North Dakota Workmen's Compensation Act, 1919 N.D. Laws ch. 162, § 258 (codified as amended at N.D. CENT. CODE §§ 65-01-01 to 65-14-05 (1985 & Supp. 1991)).

25. 1 LARSON, *supra* note 18, § 5.20, at 37. At the time of the passage of the first workers' compensation act in North Dakota, all but eight states had adopted similar acts. *Id.* at § 5.30. See also MILLUS & GENTILE, *supra* note 16, at 30. "In the years immediately following 1910, almost every jurisdiction . . . enacted a workmen's compensation statute." *Id.*

of workers' compensation is to protect injured workers and ensure the "prosperity of the state."<sup>26</sup> As a result, workers' compensation statutes are "liberally construed"<sup>27</sup> and broadly applied.<sup>28</sup> Today, workers' compensation in North Dakota protects employees from the financial strain of industrial accidents by providing guaranteed, but modest, relief for employment-related injuries.<sup>29</sup> Employees waive their common law tort rights in exchange for legislative remedies affording compensation regardless of fault.<sup>30</sup> In return, employers, through the vehicle of insurance premiums, are insulated against potential catastrophic injury loss and the uncertainty of jury verdicts.<sup>31</sup>

## B. STATUTORY COVERAGE IN NORTH DAKOTA

Workers' compensation extends coverage to employees who suffer "compensable injuries."<sup>32</sup> Injuries caused "by accident arising out of and in the course of employment" are compensable.<sup>33</sup>

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26. N.D. CENT. CODE § 65-01-01 (1985 & Supp. 1991). Section 65-01-01 provides in part: "[T]he prosperity of the state depends in a large measure upon the well-being of its wage workers, and, hence, for workers injured . . . sure and certain relief is hereby provided regardless of questions of fault and to the exclusion of every other remedy . . . ." *Id.*

27. See *Lawson v. North Dakota Workmen's Compensation Bureau*, 409 N.W.2d 344, 347 (N.D. 1987) (holding that workers' compensation statutes "should be liberally construed in favor of the worker"); *Holmgren v. North Dakota Workers' Compensation Bureau*, 455 N.W.2d 200, 202 (N.D. 1990) (holding that the workers' compensation statute should be applied liberally); *Balliet v. North Dakota Workmen's Compensation Bureau*, 297 N.W.2d 791, 794 (N.D. 1980) (recognizing that the statute should be construed to avoid forfeiture and afford relief).

28. See *Holmgren*, 455 N.W.2d at 202; *Balliet*, 297 N.W.2d at 794. See also 1 LARSON, *supra* note 18, § 5.30, at 39. The growth of workers' compensation has been characterized by the expansion of the scope of coverage. *Id.*

29. 1 LARSON, *supra* note 18, § 1.10, at 2 (noting that workers' compensation statutes uniformly provide limited but sure relief to injured workers).

30. N.D. CENT. CODE § 65-01-01 (1985 & Supp. 1991). See also *Barnes v. General Diesel & Equip. Co.*, 422 N.W.2d 819, 822 (N.D. 1988) (holding that an employee's exclusive remedy is limited to compensation provided by workers' compensation statute).

31. See N.D. CENT. CODE § 65-01-01 (1985 & Supp. 1991) (providing that workers' compensation is an exclusive remedy).

32. N.D. CENT. CODE § 65-01-02(8) (1985 & Supp. 1991).

33. *Id.* Section 65-01-02 provides in part:

8. "Compensable injury" means an injury by accident arising out of and in the course of employment.

a. The term "compensable injury", in addition to an injury by accident, includes:

(1) Any disease which can be fairly traceable to the employment. Ordinary diseases of life to which the general public outside of the employment is exposed shall not be compensable except where the disease follows as an incident to, and in its inception is caused by a hazard to which an employee is subjected in the course of his employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease includes impairment and effects from radiation fairly traceable to the employment. It need not have been foreseen or expected, but after it is contracted, it must appear to have had its origin in a risk connected with the employment and to have

In addition, diseases that can be "fairly traced" to employment are compensable.<sup>34</sup> Diseases to which the general public is exposed, however, are not compensable unless the disease is incident to employment and caused by a hazard in the employee's work environment.<sup>35</sup>

Mental and physical injuries caused by work-related mental stress are also compensable.<sup>36</sup> The compensability of injuries resulting from mental causes is, however, expressly limited.<sup>37</sup> The claimant must prove the existence of "unusual stress"<sup>38</sup> and causation must be established "with reasonable medical certainty."<sup>39</sup>

### III. PHYSICAL-MENTAL CLAIMS

#### A. HISTORY

Mental injuries that follow as a natural and direct result of a previous compensable injury have long been established as compensable.<sup>40</sup> As early as 1925, the compensability of mental injuries caused by physical impact or injury was recognized by a court.<sup>41</sup>

In recognizing the compensability of physical-mental injuries, courts have relied upon the existence of an objective cause (the employment-related event causing the initial compensable physical injury) to assist in ensuring the validity of the mental injury and its causal relationship to the employment.<sup>42</sup> When the chain of

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flowed from that source as a rational consequence. However, preventative treatment for communicable diseases is not compensable under this title.

*Id.*

34. N.D. CENT. CODE § 65-01-02(8)(a)(1) (Supp. 1991). *See also* N.D. CENT. CODE § 65-01-02(17) (Supp. 1991) (defining "[f]airly traceable"); N.D. CENT. CODE § 65-01-02(8)(b)(6) (Supp. 1991) (limiting the compensability of preexisting conditions).

35. N.D. CENT. CODE § 65-01-02(8)(a)(1) (Supp. 1991).

36. *Id.* § 65-01-02(8)(a)(3). Compensable injuries include "[i]njuries due to heart attack, stroke, and mental or physical injury precipitated by mental stimulus, which must be causally related to the employee's employment, with reasonable medical certainty, and which must have been precipitated by unusual stress." *Id.* "Mental stimulus" is the North Dakota statutory term for mental stress. *See id.*

37. *See id.*

38. *Id.* Section 65-01-02(8)(a)(3) of the North Dakota Century Code requires that injuries from mental stress "be precipitated by unusual stress." *Id.*

39. *Id.* Section 65-01-02(8)(a)(3) of the North Dakota Century Code also requires that mental stress injuries be "causally related to the employee's employment, with reasonable medical certainty." *Id.*

40. *See* 58 AM. JUR. *Workmen's Compensation* § 250 (1948 & Supp. 1975) (recognizing the compensability of mental disorders following a physical injury).

41. *See* *Rialto Lead & Zinc Co. v. State Indus. Comm'n*, 240 P. 96, 99 (Okla. 1925) (finding that claimant's nervous breakdown and neurasthenic condition was compensable).

42. *See generally* 1B LARSON, *supra* note 1, §§ 42.21-23. Professor Larson notes that both the physical-mental and mental-physical claims are uniformly accepted. *Id.* at § 42.23, at 7-876. The mental-mental claim, however, contains no physical component and remains much more controversial. *Id.* *See also* MILLUS & GENTILE, *supra* note 16, at 98 (noting that physical-mental injuries are sometimes referred to as "psychosomatic cases").

causation between the physical and mental injury is indefinite or broken, courts have denied compensation.<sup>43</sup> For example, if a claimant's mental disability is not the direct result of a prior compensable injury, but instead is attributable to nonemployment causes, compensation has not been granted.<sup>44</sup> Courts have, however, awarded compensation to claimants suffering from preexisting mental conditions, when those conditions have been aggravated by an employment-related physical injury.<sup>45</sup> Because of the inherent safeguards<sup>46</sup> that exist in physical-mental claims, courts have uniformly held that physical-mental injuries are compensable.<sup>47</sup>

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43. See 1B LARSON, *supra* note 1, § 42.22(f), at 7-866; *Greater Miami Academy v. Blum*, 466 So. 2d 1263, 1264 (Fla. Dist. Ct. App. 1985) (holding that claimant's depression occurring nine months after a compensable back injury was not compensable); *Nigherbon v. Ralph E. Feller Trucking, Inc.*, 706 P.2d 1344, 1348 (Idaho 1985) (holding that the claimant's depression was not causally linked to prior compensable injury he suffered while driving a truck); *Ada Coca-Cola Bottling Co. v. Snead*, 364 P.2d 696, 699 (Okla. 1961) (denying compensation based upon the fact that the claimant's fatal heart attack was not sufficiently linked to prior compensable injury and resulting depression).

44. See *supra* note 43 and accompanying text.

45. See 1B LARSON, *supra* note 1, § 42.22(b), at 7-856-60 (citing an extensive list of cases in which courts allowed compensation for aggravation of preexisting mental injury by a physical injury); *Ricky Coal Co. v. Adams*, 426 S.W.2d 464, 467 (Ky. 1968) (holding that the claimant's dormant mental disorder activated by physical injury was compensable); *Knief v. Great Atlantic and Pacific Tea Co.*, 291 N.Y.S.2d 463, 465 (N.Y. App. Div. 1988) (finding that the claimant's predisposition to mental disability did not preclude an award for total disability); *Kobayashi v. Siuslaw Care Ctr.*, 709 P.2d 249, 251-52 (Or. Ct. App. 1985) (holding that a claimant with a history of psychological problems was properly compensated for "functional overlay" resulting from physical injury).

46. Physical-mental claims contain several inherent guarantees of legitimacy. The first guarantee is that the claimant has actually suffered a work-related injury. For example, where a claimant has received a blow to the head and subsequently develops a neurosis, a court awarding compensation can be assured that at a minimum, the physical component of the claimant's physical-mental claim was work related. Second, the court can assess whether the prior compensable physical injury is a reasonable cause of the claimant's present mental disorder and deny compensation where a causal relationship is lacking. See *supra* note 43 and accompanying text.

47. See *Fruehauf Corp. v. Prater*, 360 So. 2d 999, 1000 (Ala. Civ. App. 1978) (holding that "depressive neurosis" caused by an employee's burn-related disability was compensable), *writ denied*, 360 So. 2d 1003; *City of Tampa v. Tingle*, 397 So. 2d 315, 317 (Fla. Dist. Ct. App. 1981) (holding that "psychiatric disability" arising out of employee's work-related physical struggle with criminals was compensable); *Walton County Bd. of Comm'rs v. Williams*, 320 S.E.2d 846, 847 (Ga. Ct. App. 1984) (finding that depression caused by work-related heat stroke was compensable); *Bruce v. Clear Springs Trout Farm*, 707 P.2d 422, 423 (Idaho 1985) (holding that "psychogenic pain syndrome caused by effects of claimant's injury" was compensable); *Ducharme v. Garland Belongia*, 544 So. 2d 590, 592 (La. Ct. App. 1989) (holding that "post traumatic stress disorder" from employee's minor automobile accident was compensable); *Redfern v. Sparks-Withington Co.*, 91 N.W.2d 516, 518-19 (Mich. 1958) (holding that "conversion hysteria" caused by employee being struck by a "weight" was compensable); *Hansel v. Chrysler Corp.*, 227 N.W.2d 276, 278 (Mich. Ct. App. 1975) (finding that "nervous tremors" and "anxiety" caused by swelling in employee's injured hand were compensable); *Mitchell v. White Castle Sys., Inc.*, 290 N.W.2d 753, 754 (Minn. 1980) (holding that an employee's psychological injuries resulting from being struck by a customer were compensable); *Gunnerson v. Kansas City Structural Steel Co.*, 535 S.W.2d 585, 589 (Mo. Ct. App. 1976) (finding that an injury to employee's "psyche" resulting from fall off a roof was compensable); *Johnston v. State*, 364 N.W.2d 1, 7 (Neb. 1985) (finding that psychological injury resulting from the unintentional ingestion of "coffee



Increased recognition and understanding of mental injuries has resulted in compensation awards for nearly every conceivable type of physically-induced mental disorder.<sup>48</sup> Conditions found

urn cleaner" was compensable); *Webb v. Hamilton*, 436 P.2d 507, 510 (N.M. 1968) (holding that "depressive reaction neurosis" caused by an employee's partial vision loss was compensable); *Wallace v. Bell Aircraft Corp.*, 93 N.Y.S.2d 162, 163 (App. Div. 1949) (holding that "functional neurosis" caused by a hammer blow to the employee's head was compensable); *Imperial Knife Co. v. Calise*, 97 A.2d 579, 580 (R.I. 1953) (holding that "fear complex" caused by employee's physical injury was compensable); *Kennedy v. Williamsburg County*, 131 S.E.2d 512, 513 (S.C. 1963) (holding that evidence supported a finding that "paranoid schizophrenia" caused by a physical attack on employee was compensable); *Merril v. Town of Ludlow*, 514 A.2d 1050, 1051 (Vt. 1986) (holding that "unmasked hysteria" caused by employee's back injury was compensable); *Seneca Falls Greenhouse & Nursery v. Layton*, 389 S.E.2d 184, 185 (Va. Ct. App. 1990) (holding that a "panic attack" caused by employee's exposure to pesticides was compensable). See also 1B LARSON, *supra* note 1, § 42.22(a), at 7-832. Professor Larson states that "when there has been a physical accident or trauma, and claimant's disability is increased or prolonged by traumatic neurosis, conversion hysteria or hysterical paralysis it is now uniformly held that full disability including the effects of the neurosis is compensable." *Id.*

48. 1B LARSON, *supra* note 1, § 42.22(a), at 7-832. "There is almost no limit to the variety of disabling 'psychic' conditions that have already been recognized as legitimately compensable—conditions which not many years ago would have received little understanding or recognition on the part of the courts." *Id.* at 7-855. For a complete diagnostic description of all the various types of mental disorders, see AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. 1987).

The major classes of emotional disorders can essentially be divided into two main categories, psychosis and neurosis. 2 J.E. SCHMIDT, *THE ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER*, N-45, P-249 (1982).

[Neurosis] is regarded as a functional disease, i.e., one not caused by a lesion (structural change) of the nervous system. There is no appreciable disorganization of the personality and no loss of understanding of the external reality, although there is some impairment of judgment and rational thinking. It is believed that neuroses are caused by an unsuccessful attempt to resolve subconscious emotional conflicts. The neuroses are classified and named on the basis of the predominant symptom, such as anxiety, which is a common accompaniment of the neurotic state. The more common neuroses are: anxiety neurosis, depressive neurosis, obsessive neurosis, compulsive neurosis, [and] phobic (fear) neurosis . . . [a]lso called *psychoneurosis*.

*Id.* at N-45.

[Psychosis is a] mental disorder in which the personality is seriously affected, being much more disorganized than in the case of a neurosis. Insight is usually lost; this is to say that the patient does not realize that his symptoms are abnormal and he fails to recognize reality. He loses the capacity to communicate and to relate to others. The condition also deprives him of the ability to cope with the problems of everyday life. A psychosis is more incapacitating than a neurosis and is less likely to terminate in a cure.

*Id.* at P-249. For complete "case examples" of the various mental disorders most frequently involved in workers' compensation litigation, see Nelson C. Policastro, *Neurological and Psychiatric Injuries*, 21 TRAUMA 3:47, 3:90 (1979). Trauma induced neurosis resulting from an "[i]ndustrial [a]ccident" is "[c]haracterized by marked anxiety and fear" and is "[a]ssociated with psychosomatic symptoms." *Id.* at 3:89. This type of neurosis can be divided into three classes: (1) "[t]raumatic anxiety neurosis;" (2) "[h]ysterical conversion neurosis;" and (3) "[d]epressive neurosis." *Id.* Traumatic anxiety neurosis is characterized by "[a]nxiety," "[e]motional irritability," "[n]ervousness," and "[f]ear." *Id.*

In contrast, "hysterical conversion neurosis" can be diagnosed through objectively determined manifestations affecting a person's "special senses and voluntary nervous system," including "[d]eafness," "[b]lindness," "[l]oss of smell," and "[p]aralysis." *Id.* Depressive neurosis is characterized "by an excessive reaction of depression" caused by a "physical or psychic trauma." *Id.* at 3:92. For example, a depressive neurosis could result from an

compensable by the courts include "depressive neurosis,"<sup>49</sup> "psychogenic pain syndrome,"<sup>50</sup> "post traumatic stress disorder,"<sup>51</sup> "conversion hysteria,"<sup>52</sup> and "psychological functional overlay."<sup>53</sup>

## B. DEVELOPMENT IN NORTH DAKOTA

Physical-mental injuries contributing to disability have been recognized as compensable in North Dakota since 1964.<sup>54</sup> The compensability of physical-mental claims is, however, contingent on the claimant's ability to prove the existence of a disabling injury causally related to a prior compensable injury.<sup>55</sup> In *Lyson v. North Dakota Workmen's Compensation Bureau*,<sup>56</sup> the claimant sought to recover benefits after suffering a major injury to his spine.<sup>57</sup> The injury required two major back operations, rendering the

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employment-related traumatic event involving physical injury, harassment or confrontations in the workplace. *Id.*

In the second major category of emotional disorder, psychosis, the disorder most frequently encountered in workers' compensation cases is "paranoid psychosis." *Id.* at 3:94. This type of psychosis "is characterized by hypersensitivity to the opinions of others with whom they work, blaming others for their own errors and inadequacies and an inability to adjust to others." *Id.*

One of the major problems with mental-mental claims is that the severity of a claimant's emotional disorder is often unrelated to the severity of the disability caused by that disorder. Eric H. Marcus, *The Anatomy Of Litigation Involving Mental Distress*, 30 TRAUMA 2:13, 2:16 (1988). For example, "[p]ersons with very serious psychiatric diagnoses [psychosis] can have little, if any impairment, and people with relatively mild psychiatric diagnoses (formerly called neurosis) can be severely incapacitated." *Id.*

49. 1B LARSON, *supra* note 1, § 42.22(a), at 7-855. *See supra* note 48 and accompanying text (noting that a depressive neurosis is characterized by an excessive depression reaction).

50. 1B LARSON, *supra* note 1 § 42.22(a), at 7-855. *See also* 2 J.E. SCHMIDT, THE ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER, p-246 (1982) (noting that psychogenic injuries are injuries originating in the mind through a mental process).

51. 1B LARSON, *supra* note 1, § 42.22(a), at 7-855. *See also* SCHMIDT, *supra* note 50, at p-196 (noting that post traumatic stress occurs "after, and as a result of, injury to a part of the body").

52. 1B LARSON, *supra* note 1, § 42.22(a), at 7-855. *See supra* note 48 and accompanying text (noting that hysterical conversion neurosis is characterized by affects on the claimant's "special senses and voluntary nervous system").

53. *Id.* *See infra* note 59 and accompanying text ("functional overlay" is a term utilized by psychiatrists to account for a claimant's condition in the absence of identifiable physical cause).

54. *See Lyson v. North Dakota Workmen's Compensation Bureau*, 129 N.W.2d 351 (N.D. 1964). Following *Lyson*, the North Dakota Supreme Court has reaffirmed the compensability of physical-mental injuries. *See Aus v. North Dakota Workmen's Compensation Bureau*, 280 N.W.2d 911, 914 (N.D. 1979) (entitling claimant to a formal evidentiary hearing on alleged claim of neurosis resulting from employee's fall); *Darnell v. Workers' Compensation Bureau*, 450 N.W.2d 721, 725 (N.D. 1990) (reaffirming the compensability of physical-mental injuries in North Dakota).

55. N.D. CENT. CODE § 65-01-02(8) (Supp. 1991). Physical-mental claims do not require "unusual stress" or "reasonable medical certainty". *Id.* Section 65-01-02(8)(a)(3) is not applicable when mental injuries are caused by physical stimuli resulting in a prior compensable injury. N.D. CENT. CODE § 65-01-02(8)(a)(3) (Supp. 1991). *See supra* note 32 and accompanying text.

56. 129 N.W.2d 351 (N.D. 1964).

57. *Lyson v. North Dakota Workmen's Compensation Bureau*, 129 N.W.2d 351, 355 (N.D. 1964).

claimant unemployable in his former occupation as a laborer.<sup>58</sup> In addition to the claimant's physical injuries, experts testified that the claimant's operations had caused the claimant to suffer from "neurosis, hysteria and functional overlay,"<sup>59</sup> contributing significantly to the claimant's total disability.<sup>60</sup> Examining the relationship between the claimant's mental disorder and his employment-caused physical injury, the court observed that the causal chain between the claimant's physical injury and mental disorder was not broken.<sup>61</sup> The court further stated that "[i]n the whole record there is no proof that claimant is malingering or that he does not suffer the pain of which he complains" and "in the absence of any other explanation in the record, we must find that the neurosis and resulting disability was caused by claimant's injury and subsequent treatment thereof."<sup>62</sup>

Affirming the district court's award of benefits for permanent total disability,<sup>63</sup> the North Dakota Supreme Court observed that "[n]eurosis, emotional disturbances, and mental illness can be as disabling as the most serious of physical injuries, even though they cannot be established by objective diagnostic procedures."<sup>64</sup> The court added that "[w]e have no doubt but that disabilities which are the result of neurosis caused by injuries are compensable."<sup>65</sup>

In considering the validity of a physical-mental claim, the court in *Lyson* made two inquiries.<sup>66</sup> The court first examined the chain of causation between the claimant's prior physical injury and

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58. *Id.*

59. *Id.* See also Eric H. Marcus, *The Anatomy of Litigation Involving Mental Distress*, 30 TRAUMA 2:13, 2:29 (1988). "Functional overlay" is a term used by psychiatrists to account for the existence of a patient's symptoms for which there appears to be no physical cause. *Id.* This method of diagnosis, termed "diagnosis by exclusion," has been attacked by critics who assert that the absence of "physical findings is not in itself sufficient to justify a psychiatric diagnosis." *Id.* (quoting Physicians' Guide for Disability Evaluation Examinations, Veterans Administration, March, 1985).

60. *Lyson v. North Dakota Workmen's Compensation Bureau*, 129 N.W.2d 351, 355 (N.D. 1964).

61. *Id.* The court noted that "[s]uccessive operative traumata" resulting from the claimant's spinal operations was the only apparent explanation for the claimant's condition. *Id.* The court held that "in the absence of any other explanation . . . we must find that the neurosis and the resulting disability were caused by the claimant's injury and subsequent treatment thereof." *Id.* The court also observed that "the causal chain between the injury and neurosis" appeared unbroken. *Id.*

62. *Id.*

63. *Id.* at 356.

64. *Id.* at 354. The *Lyson* court noted that the claimant had a very limited education and was not qualified for employment other than manual labor. *Id.* at 355. The claimant suffered from genuine pain and was not a "malingerer." *Id.* The court also observed that the causal chain between the claimant's injury and mental disorder was not broken. *Id.*

65. *Lyson*, 129 N.W.2d at 354 (citing numerous authorities).

66. *Id.*

his present mental disability.<sup>67</sup> Next, the court conducted a complete review of the claimant's work and medical history to determine the legitimacy and extent of the claimant's disability.<sup>68</sup>

Presently, courts evaluating a claimant's disability consider the following statutory factors including the claimant's age, education, "vocational rehabilitation potential," and the nature and degree of the injury involved.<sup>69</sup> The court's acceptance of the claimant's mental disability as compensable ultimately rests on the testimony of medical experts and their ability to convey a reasonable cause and effect relationship between the claimant's previous physical injury and his or her present mental condition.<sup>70</sup>

In a more recent case, *Kuklok v. Workers' Compensation Bureau*,<sup>71</sup> the claimant sought recovery for a mental disorder that was the alleged result of physical injuries suffered by the claimant while working on a pipeline.<sup>72</sup> Evidence was introduced that the claimant had been the victim of two work-related accidents resulting in a "broken collar bone," "contusions of the left kidney," and

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67. *Id.* at 355.

68. *Id.*

69. N.D. CENT. CODE § 65-01-02(12) (1985 & Supp. 1991). Under section 65-01-02, six factors are considered when determining disability: "(1) Nature of the injury; (2) Degree of physical impairment; (3) Age; (4) Education; (5) Work history; and (6) Vocational rehabilitation potential." See also *Lyson*, 129 N.W.2d at 355. The court based much of its decision to award compensation on the fact that the claimant, only educated through the eighth grade, could no longer perform manual labor, the only job for which he was qualified. *Id.* The court also noted that the claimant had made numerous unsuccessful attempts to resume working as a laborer and there was no proof that the claimant was "malingering." *Id.* The *Lyson* court stated:

The words "total disability" as used in the workmen's compensation acts should be taken in their plain or ordinary and usual sense. In order to determine total disability under the statutes both the type of work being done at the time of the accident and the nature and extent of the injury must be considered; and regard must be had to age, experience, training, and capabilities of the employee.

Generally, an employee is totally incapacitated and entitled to the compensation provided therefor where by reason of the injury he is so disqualified from performing the usual tasks of a workman that he is unable to procure and retain employment.

*Id.* (quoting 99 C.J.S. Workmen's Compensation § 299 (1958)).

70. See 1B LARSON, *supra* note 1, § 42.22(f), at 7-866 (noting that courts deny compensation where a cause and effect relationship does not exist between the claimant's prior compensable physical injury and resulting mental disorder). See also *Lyson*, 129 N.W.2d at 355. "While the physicians have not been able to account for the [claimant's] pain upon the basis of concrete physical defects, they have accounted for it on the basis of neurosis, hysteria and functional overlay." *Id.* See also Eric H. Marcus, *The Anatomy Of Litigation Involving Mental Distress*, 30 TRAUMA 2:13, 2:41 (1988). While providing an evaluation of various defense and plaintiff strategies employable in mental disability litigation, Dr. Marcus notes that the threshold step in establishing a mental disability claim is the conversion of a claimant's behavior into a recognized mental disorder. *Id.* at 2:13-14. "This process can only be properly and legally performed by official state licensed 'conversion agents,' namely psychiatrists and psychologists." *Id.* at 2:14.

71. 492 N.W.2d 572 (N.D. 1992).

72. *Kuklok v. Workers' Compensation Bureau*, 492 N.W.2d 572, 573 (N.D. 1992).

a "disabling back injury."<sup>73</sup> Two medical experts testified that the claimant was suffering from a mental disorder as a result of his work-related accidents.<sup>74</sup> Additional medical experts confirmed that the claimant was suffering from a mental disorder, but concluded that the claimant's mental disorder was not causally linked to his work-related accidents.<sup>75</sup>

The Workers Compensation Bureau awarded benefits to the claimant for his physical injuries, but denied the claimant compensation for his mental disorder.<sup>76</sup> The Bureau rejected medical evidence supporting a causal link between the claimant's employment and his mental disorder on the grounds that the evidence failed to adequately account for the claimant's preexisting "psychological problems."<sup>77</sup>

The North Dakota Supreme Court affirmed the Bureau's decision, holding that the claimant did not have a compensable psychological disorder.<sup>78</sup> Applying the limited standard of review required on appeals from Bureau decisions,<sup>79</sup> the court concluded

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73. *Id.* While performing work-related duties, the claimant was involved in a one vehicle accident and then one week later was struck by a portion of pipe. *Id.*

74. *Id.* at 574. One medical expert, Dr. Mayer, concluded that the claimant was suffering from an "adjustment disorder" and "agitated depression" which was precipitated by the claimant's employment accidents. *Id.* Dr. Mayer, however, also stated that the claimant was to some degree predisposed to the mental disorder that he suffered. *Id.* Another medical expert, Dr. Foster, concluded that the claimant was suffering from "post-traumatic stress disorder" and that the claimant's "psychiatric problems" were causally related to his employment accidents. *Id.*

75. *Id.* A third medical expert, Dr. Berg, concluded that the claimant suffered from "'significant emotional problems'" predating his accidents and that the claimant's mental disorder was not causally related to the his accidents. *Id.* The final medical expert, Dr. McNairy, diagnosed the claimant "as having a paranoid personality disorder, and he concluded that neither work accident . . . was a substantial cause of (the claimant's) psychiatric problems." *Id.*

76. *Id.* at 573.

77. *Kuklok*, 492 N.W.2d at 575. The Bureau explained its decision as follows:

In forming his opinions, Dr. Foster relied primarily upon claimant's own history. Dr. Foster did not administer any psychological tests, and he did not review the Veteran's Administration medical records or a number of other medical records and reports relating to treatment and evaluations of the claimant that predate his work injuries . . . . The greater weight of the evidence does not indicate that claimant's psychiatric disorders are causally related to his work injuries, or that the work injuries substantially contributed to his psychiatric disorders or symptoms of those disorders. The Bureau bases this finding primarily on the opinions of Drs. McNairy and Berg . . . . The Bureau finds that claimant had a personality disorder that pre-existed his work injuries. Claimant's current symptoms are related to this personality disorder, and there is insufficient substantiation that his symptoms are causally related to the work injuries, or that the work injuries substantially contributed to his current symptoms.

*Id.*

78. *Id.*

79. *Id.* at 573. The court reiterated that Bureau decisions are upheld unless the Bureau's "findings are not supported by a preponderance of the evidence." *Id.* (citing N.D. CENT. CODE § 28-32-19(5) (1991)). The court added that "[i]n making that determination,

that the Bureau's decision was supported by a preponderance of the evidence.<sup>80</sup> Further, the court noted that the Bureau's decision was supported by credible medical evidence<sup>81</sup> and that a reasonable person could conclude that the claimant's psychiatric problems were not casually related to his industrial accidents.<sup>82</sup> The court added that the conflict in medical testimony presented "a classic illustration of the limits of psychiatry and psychology in analyzing human behavior based upon the present state of scientific knowledge."<sup>83</sup>

While physical-mental injuries remain compensable in North Dakota, difficulties in establishing causation and the limited standard of review applied to Bureau decisions limit the potential success of physical-mental claims brought before the courts.<sup>84</sup> The court's acceptance of the claimant's mental disorder as compensable ultimately rests on the testimony of medical experts and their ability to convey a reasonable cause and effect relationship between the claimant's previous physical injury and present mental condition.<sup>85</sup>

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we do not make independent findings of fact or substitute our judgment for that of the Bureau." *Id.* (citing *Jones v. Workers' Compensation Bureau*, 461 N.W.2d 273 (N.D. 1990)). When reviewing Bureau decisions the court only considers "whether the Bureau could have reasonably reached its factual determinations by a preponderance of the evidence." *Kuklok*, 492 N.W.2d at 573 (citing *Moses v. North Dakota Workers' Compensation Bureau*, 429 N.W.2d 436 (N.D. 1988)). *See also infra* note 121 and accompanying text (outlining the limited standard of review applied to Bureau decisions).

80. *Id.* at 575.

81. *Id.* Addressing the conflict in medical testimony, the court stated: "We will not substitute our judgment for that of the Bureau in weighing and judging the credibility of medical evidence." *Id.* (citing *Kroeplin v. Workers' Compensation Bureau*, 434 N.W.2d 351 (N.D. 1989)).

82. *Kuklok*, 492 N.W.2d at 575. The court stated: "Although the Bureau may weigh and resolve conflicting medical opinions, the Bureau must adequately explain its reason for disregarding evidence favorable to the claimant." *Id.* (citing *DeChandt v. North Dakota Workers' Compensation Bureau*, 452 N.W.2d 82 (N.D. 1990)). The court added: "The Bureau must explain why it is relying upon medical evidence supporting a denial of benefits, rather than upon conflicting medical evidence that supports an award of benefits." *Kuklok*, 492 N.W.2d at 575 (citing *Jones v. Workers' Compensation Bureau*, 461 N.W.2d 273 (N.D. 1990)). In the present case, the court observed that "[t]he contrary medical evidence, primarily from Dr. Mayer and Dr. Foster, concluding that [the claimant's] depression, anxiety, and anger are the result of his employment accidents, was rejected by the Bureau on the ground that it does not adequately account for [the claimant's] pre-accident history of psychological problems." *Id.*

83. *Id.* at 574. *See also infra* notes 155, 158, 160 and accompanying text (outlining the current problems that accompany the use of testimony by mental health experts).

84. *See supra* note 79 and accompanying text (providing the limited standard of review applied to Bureau decisions).

85. *Kuklok*, 492 N.W.2d at 573. *See also* 1B LARSON, *supra* note 1, § 42.22(f), at 7-866 (noting that courts deny compensation where a cause and effect relationship does not exist between the claimant's prior compensable physical injury and resulting mental disorder). *See also Lyson*, 129 N.W.2d at 355. "While the physicians have not been able to account for the [claimant's] pain upon the basis of concrete physical defects, they have accounted for it on the basis of neurosis, hysteria and functional overlay." *Id.* *See also* Eric Marcus, *The Anatomy Of Litigation Involving Mental Distress*, 30 TRAUMA 2-13, 2-41 (1988). While

## IV. MENTAL-PHYSICAL CLAIMS IN NORTH DAKOTA

## A. EXPANSION

The second category of mental stress claim, mental-physical, has received uniform recognition by all states, including North Dakota.<sup>86</sup> In contrast to the relative obscurity of physical-mental claims, the development of mental-physical claims in North Dakota has been extensive.<sup>87</sup> The majority of the claims involve heart attacks or strokes caused by mental stress combined with physical exertion.<sup>88</sup> In heart attack and stroke cases, claimants often seek to establish that their injury was the result of their employment through assertions that work-related mental and physical stress caused or substantially contributed to the resulting injury.<sup>89</sup>

The development of mental-physical claims can be traced to the early recognition of the compensability of injuries caused by physical exertion.<sup>90</sup> By 1924, the North Dakota Supreme Court, in *Pace v. North Dakota Workmen's Compensation Bureau*,<sup>91</sup> recognized that a "physical impact" was not a prerequisite to a compensable injury.<sup>92</sup> Rejecting the physical impact requirement, the court held that injuries suffered as a result of unusual exertions imposed upon workers by the conditions of their employment were compensable.<sup>93</sup>

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providing an evaluation of various defense and plaintiff strategies employable in mental disability litigation, Dr. Marcus notes that the threshold step in establishing a mental disability claim is the conversion of a claimant's behavior into a recognized mental disorder. *Id.* at 2-13-14. "This process can only be properly and legally performed by official state licensed 'conversion agents,' namely psychiatrists and psychologists." *Id.* at 2-14.

86. See 1B LARSON, *supra* note 1, § 42.21(a), at 7-813.

87. See *Sandlie v. North Dakota Workmen's Compensation Bureau*, 295 N.W. 497 (N.D. 1941); *Nelson v. North Dakota Workmen's Compensation Bureau*, 316 N.W.2d 790 (N.D. 1982); *Ganske v. North Dakota Workmen's Compensation Bureau*, 355 N.W.2d 800 (N.D. 1984); *Grace v. North Dakota Workmen's Compensation Bureau*, 395 N.W.2d 576 (N.D. 1986).

88. See, e.g., *Grace*, 395 N.W. 2d at 576 (claimant asserting heart attack caused by mental stress and physical exertion in extreme heat).

89. See, e.g., *Nelson*, 316 N.W.2d at 794 (claimant asserting that work-related emotional stress and physical exertion caused husband's fatal heart attack).

90. See *Pace v. North Dakota Workmen's Compensation Bureau*, 201 N.W. 348, 351 (N.D. 1924). In *Pace*, benefits were sought on behalf of the deceased claimant for injuries that the claimant suffered while cleaning a boiler in extreme heat. *Id.* Evidence was introduced that the claimant's death was the result of a ruptured blood vessel, directly related to the extreme working conditions under which the claimant was laboring. *Id.*

91. 201 N.W. 348 (N.D. 1924).

92. *Pace v. North Dakota Workmen's Compensation Bureau*, 201 N.W. 348, 351 (N.D. 1924). The court held that injuries caused by working conditions, including extreme heat, are compensable under workers' compensation in the absence of a physical impact or injury. *Id.*

93. *Id.* The court also held that the plaintiff's preexisting heart condition did not bar his recovery. *Id.* "It is quite immaterial that the decedent may have brought with him a

The elimination of the physical impact requirement opened the door to recovery for physical injuries caused by mental stimuli. While early attempts to establish mental-physical claims were unsuccessful,<sup>94</sup> this lack of success was more a reflection of the court's adherence to the unusual exertion rule rather than an outright rejection of the compensability of mental-physical injuries.<sup>95</sup> The effect of the unusual exertion rule in mental-physical cases was to prevent recovery unless the physical injury was accompanied by an unusual stress or strain on the body.<sup>96</sup>

The validity of the unusual exertion rule was soon questioned by the court.<sup>97</sup> In 1976, the Supreme Court of North Dakota in *Stout v. Workmen's Compensation Bureau* abrogated the requirement.<sup>98</sup> The previous standard of unusual exertion was replaced with the "usual-exertion rule," eliminating "unusual-exertion" as a prerequisite to compensation in mental-physical cases.<sup>99</sup> Under the "usual exertion" rule, employees can recover for injuries caused gradually by the routine performance of their employment.<sup>100</sup>

Following the court's decision in *Stout*, the number of claims involving heart disease rose dramatically.<sup>101</sup> In response to this

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disability." *Id.* "The evidence supports a finding that the disability brought with him was aggravated by the conditions under which he was compelled to labor." *Id.*

94. *Sandlie v. North Dakota Workmen's Compensation Bureau*, 295 N.W. 497, 499 (N.D. 1940). The *Sandlie* court observed that while acceleration of a preexisting disease may in certain circumstances be a compensable injury, the plaintiff had failed to prove that emotional stress was the "proximate cause" of his heart attack. *Id.* at 499-500.

95. *See id.* The *Sandlie* court noted "that every exertion has its effect upon the physical system." *Id.*

96. 1B LARSON, *supra* note 1, § 38.64, at 7-187.

97. *See Suedel v. North Dakota Workmen's Compensation Bureau*, 218 N.W.2d 164, 175 (N.D. 1974). The court, while observing that a majority of jurisdictions allow recovery for injuries caused by an usual exertion, stated: "[W]e leave for another day the determination of the survival of the unusual exertion test." *Id.* at 173-75.

98. 236 N.W.2d 889 (N.D. 1975). The court held that the unusual exertion rule is "historically incorrect, logically unsound, and impractical in operation." *Id.* at 894 (citing LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 38.61, at 7-98, § 38.62, at 7-100, § 38.63, at 7-102).

99. *Stout v. North Dakota Workmen's Compensation Bureau*, 236 N.W.2d 889, 894 (N.D. 1975).

The 'by accident' requirement is now deemed satisfied in most jurisdictions either if the cause was of an accidental character or if the effect was the unexpected result of the routine performance of the claimant's duties. Accordingly, if strain of claimant's usual exertions causes collapse from heart weakness, back weakness, hernia, and the like, the injury is held accidental. A very substantial minority of jurisdictions require a showing that the exertion was in some way unusual, or make other reservation, but this line of decision causes difficulty because of the constant necessity of drawing distinctions between usual and unusual strains.

*Id.* (quoting LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 38.30, at 7-37).

100. *See Stout*, 236 N.W.2d at 894.

101. *See, e.g., Nelson v. North Dakota Workmen's Compensation Bureau*, 316 N.W.2d 790 (N.D. 1982) (noting the increase in heart attack claims following the *Stout* decision).



increase, the Legislature codified the unusual exertion rule, amending section 65-01-02 of the North Dakota Century Code to require "unusual stress" as a prerequisite to recovery in cases involving heart attacks or strokes.<sup>102</sup> In 1989, the "unusual stress" requirement was extended to include all mental or physical injury precipitated by mental stimulus.<sup>103</sup>

## B. UNUSUAL STRESS AND REASONABLE MEDICAL CERTAINTY

Mental-physical injuries are compensable in North Dakota if "precipitated by unusual stress"<sup>104</sup> and "causally related to the employee's employment, with reasonable medical certainty."<sup>105</sup> While the requirements of "unusual stress" and "reasonable medical certainty" were intended to limit claims,<sup>106</sup> the terms are not further defined by statute.<sup>107</sup> Both terms, however, have been extensively considered and defined by the courts.<sup>108</sup>

The requirement of unusual stress does not require that the work causing an injury differ in nature from the work usually per-

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102. 1977 N.D. Laws ch. 579, § 2 (codified as amended at N.D. CENT. CODE § 65-01-02(8)(a)(3) (Supp. 1991)). See *supra* note 36 and accompanying text.

103. 1989 N.D. Laws ch. 765, § 1 (codified at N.D. CENT. CODE § 65-01-02(8)(a)(3) (Supp. 1991)). The claimant is also required by section 65-01-02(8)(a)(3) to prove a causal relationship between employment and injury with "reasonable medical certainty." *Id.*

104. N.D. CENT. CODE § 65-01-02(8)(a)(3) (Supp. 1991).

105. *Id.* See also *Christianson v. North Dakota Workers' Compensation Bureau*, 470 N.W.2d 613, 615 (N.D. 1991) (stating that "unusual stress" and "reasonable medical certainty" are required to prove that a heart attack is compensable); *Nelson v. North Dakota Workmen's Compensation Bureau*, 316 N.W.2d 790, 795 n.3 (N.D. 1982) (holding that aggravation awards "absent a showing of unusual stress" are unavailable for mental physical injuries); *Satrom v. North Dakota Workmen's Compensation Bureau*, 328 N.W.2d 824, 828 (N.D. 1982) (holding that the requirement of unusual stress precludes recovery for employment-caused diseases covered by section 65-01-02(8)(a)(3) of the North Dakota Century Code).

106. *Nelson v. North Dakota Workmen's Compensation Bureau*, 316 N.W.2d 790, 794 (N.D. 1982).

This provision, inserted by the 1977 Legislative Assembly, Chapter 579, Sec. 2, 1977 N.D. Sess. Laws, is one of the few definitions of injury in the Workmen's Compensation Act which is directed to specific ailment. A reading of the legislative history of this amendment to Section 65-01-02 leaves no doubt that it was enacted as a result of this court's decision in *Stout v. N.D. Workmen's Compensation Bureau*, 236 N.W. 2d 889 (N.D. 1975), holding that the "usual exertion" rule in workmen's compensation cases is the law of North Dakota. *Stout* involved a claim for death due to a heart attack and the Bureau had argued that it made awards for heart attacks only where there was evidence of "unusual exertion" but not where it was "usual." This court held that distinction arbitrary and refused to follow it. The distinction is now required by statute and we must apply it in this instance.

*Id.* at 793-94 n.2.

107. See N.D. CENT. CODE § 65-01-02 (1985 & Supp. 1991).

108. See, e.g., *Schmaltz v. North Dakota Workers' Compensation Bureau*, 449 N.W.2d 817, 820-22 (N.D. 1989) (defining unusual stress).

formed by the claimant.<sup>109</sup> Furthermore, "[u]nusualness may be a matter of degree, not kind"<sup>110</sup> and "may appear in duration, strenuousness, distance or other circumstances involved in the execution of routine assignments."<sup>111</sup> The unusual stress requirement is satisfied when an employee's work-related duties impose an "exceptional strain" upon the employee.<sup>112</sup> The North Dakota Supreme Court has held that work-imposed strains are exceptional when they result in damage to the employee's heart.<sup>113</sup> Additionally, determinations of the existence of unusual stress require an examination of the claimant's entire work history.<sup>114</sup>

The claimant can establish sufficient causation by proving<sup>115</sup> with reasonable medical certainty that his or her employment was the sole cause of, or a substantial contributing factor to, the injury.<sup>116</sup> The establishment of reasonable medical certainty is largely dependent upon the testimony and conclusions of medical experts.<sup>117</sup>

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109. *Nelson*, 316 N.W.2d at 796. The *Nelson* court held that "[u]nusual or extraordinary over-exertion . . . does not require that the work causing the attack be different in nature from the employee's usual work." *Id.* (quoting *City of Denver v. Industrial Comm'n*, 579 P.2d 80, 82 (Colo. 1978)).

110. *Grace v. North Dakota Workmen's Compensation Bureau*, 395 N.W.2d 576, 581 (N.D. 1986) (quoting LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 38.64(a)(9) (1986)).

111. *Id.*

112. *See, e.g., Schmaltz v. North Dakota Workers' Compensation Bureau*, 449 N.W.2d 817, 821-22 (N.D. 1989).

The phrase 'unusual or excessive strain', as sometimes used in describing these cases, is not so limited in its meaning as to include only work of an entirely different character from that customarily done. Simply stated, so long as the conditions of performing the work are such that an exceptional strain is imposed on the worker so great that his heart is affected and damaged thereby, the requirement of unusual or excessive strain is satisfied.

*Id.* (quoting *Schecter v. State Ins. Fund*, 160 N.E.2d 901, 904 (N.Y. App. 1959)).

113. *Schmaltz*, 449 N.W.2d at 821-22.

114. *See Grace v. North Dakota Workmen's Compensation Bureau*, 395 N.W.2d 576, 581 (N.D. 1986) (holding that unusual stress must be applied according to the employee's entire work history); *Nelson v. North Dakota Workmen's Compensation Bureau*, 316 N.W.2d 790, 796 (N.D. 1982) (holding that the "overexertion doctrine" is to be applied to employee's total work history).

115. *See, e.g., Christianson v. North Dakota Workers Compensation Bureau*, 470 N.W.2d 613, 615 (N.D. 1991). "The claimant has the burden of showing by a preponderance of the evidence that he was actually injured in the course of employment and that the ensuing disability is causally connected to the employment injury." *Id.* at 615 (citing *Inglis v. Workmen's Compensation Bureau*, 312 N.W.2d 318 (N.D. 1981)).

116. *Nelson v. North Dakota Workmen's Compensation Bureau*, 316 N.W.2d 790, 795 (N.D. 1982). "There is no requirement that work-related stress be the sole cause of infarction; it is sufficient for the stress to be a substantial contributing factor." *Id.* at 795 (quoting *Aker v. State Dep't of Natural Resources*, 282 N.W.2d 533, 535 (Minn. 1979)).

117. *See Grace v. North Dakota Workmen's Compensation Bureau*, 395 N.W.2d 576, 577 (N.D. 1986); *Kuntz v. Workmen's Compensation Bureau*, 139 N.W.2d 525, 527 (N.D. 1966) (holding that a causal relationship does not have to be established with "absolute medical certainty"). *But see Ganske v. North Dakota Workmen's Compensation Bureau*, 355 N.W.2d 800, 802 (N.D. 1984) (finding that physician's testimony alone was insufficient to establish reasonable medical certainty).

The elements of "unusual stress"<sup>118</sup> and "reasonable medical certainty"<sup>119</sup> present formidable barriers to recovery for mental-physical injuries. In addition, each workers' compensation claim is initially heard by the Bureau of Workers' Compensation, the sole fact finder, and the Bureau decisions are given the "same faith and credit as the judgment of a court of record."<sup>120</sup> On contentious issues in which compensation is denied, recovery is further restricted by the limited standard of review that is applied to decisions of the North Dakota Workers' Compensation Bureau.<sup>121</sup> On review of Bureau decisions, courts do not make independent findings of fact but determine only "whether a reasoning mind reasonably could" have reached the Bureau's factual conclusions.<sup>122</sup> Not surprisingly, the success rate of mental-physical claims in the courts has been dismal.<sup>123</sup>

In *Nelson v. North Dakota Workmen's Compensation Bureau*,<sup>124</sup> the claimant sought recovery for a fatal heart attack that the claimant's husband suffered while performing the light duty of connecting hoses to his truck.<sup>125</sup> Evidence was introduced that the decedent suffered emotional stress from the alienation

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118. See, e.g., *Grace v. North Dakota Workmen's Compensation Bureau*, 395 N.W.2d 576, 577 (N.D. 1986) (holding that stress caused by 120 degree temperatures were not unusual and therefore the claim was denied).

119. See, e.g., *Schmaltz v. North Dakota Workers' Compensation Bureau*, 449 N.W.2d 817, 824 (N.D. 1989) (implying that reasonable medical certainty requires an undisputed medical opinion).

120. N.D. CENT. CODE § 65-05-03 (1985 & Supp. 1991) (providing the jurisdiction of the Workers' Compensation Bureau).

121. See *Grace*, 395 N.W.2d at 579. "In an appeal from a judgment of the district court involving the decision of an administrative agency, our review is limited to an examination of the decision of the agency and not the decision of the district court." *Id.* (citing *Skjefte v. Job Serv.* N.D., 392 N.W.2d 815 (N.D. 1986)). See also *Schmaltz v. North Dakota Workers' Compensation Bureau*, 449 N.W. 2d 817, 820 (N.D. 1989) (stating that a review of administrative decisions should be conducted with restraint); *Christianson v. North Dakota Workers' Compensation Bureau*, 470 N.W.2d 613, 615 (N.D. 1991).

In determining whether an agency's findings of fact are supported by a preponderance of the evidence, the court does not make independent findings of fact or substitute its judgment for that of the agency, but determines only whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the greater weight of evidence.

*Id.*; N.D. CENT. CODE § 28-32-19(5) (1991) (providing that the court is required to affirm decisions of an administrative agency unless the findings of fact by the agency are not supported by a preponderance of the evidence); *Weber v. North Dakota Workmen's Compensation Bureau*, 377 N.W.2d 571, 576 (N.D. 1985) (holding that evidence may not be evaluated by the Bureau in an unreasoned manner).

122. *Schmaltz*, 449 N.W.2d at 820 (citations omitted).

123. See, e.g., *Christianson v. North Dakota Workers' Compensation Bureau*, 470 N.W.2d 613, 615 (N.D. 1991).

124. 316 N.W.2d 790 (N.D. 1982).

125. *Nelson v. North Dakota Workmen's Compensation Bureau*, 316 N.W.2d 790, 796 (N.D. 1982).

that resulted from his position as a "working foreman."<sup>126</sup> In determining the compensability of the decedent's injuries, the court considered the decedent's previous health problems,<sup>127</sup> the nature of the work being performed at the time of the accident,<sup>128</sup> and the evidence that the decedent was subjected to unusual emotional stress.<sup>129</sup> After considering these fore-mentioned factors, the court denied compensation based upon the claimant's failure to prove that the decedent's injuries were both caused by his employment and precipitated by unusual stress.<sup>130</sup>

The evidence that the decedent's employment subjected him to unusual emotional stress was limited to the testimony of the claimant and a "friend" of the decedent's which the court concluded was "scanty at best."<sup>131</sup> The court added that "[o]f all the categories of emotional causes of heart attacks and cerebral hemorrhages the poorest track record belongs to that of anger and excitement generated by work connected arguments and fights."<sup>132</sup>

In more recent cases, recovery for mental-physical injuries has been equally unsuccessful.<sup>133</sup> In *Grace v. North Dakota Work-*

126. *Id.* The decedent was apparently positioned between management and union employees, receiving pressure from both sides. *Id.* at n.5.

127. *Id.* at 796. The decedent in *Nelson* suffered from hypertension with a history of cigarette smoking. *Id.* Evidence at trial indicated that "smoking and hypertension alone may have caused" the decedent's heart attack but that stress may have "tipped the balance." *Id.* at 792. The court also noted that while a "causal connection between the employment and the heart" is a prerequisite to recovery, employees with preexisting heart disease "or habits which contribute to heart disease" are not precluded from recovery. *Id.* at 795. See also *Christianson v. North Dakota Workers' Compensation Bureau*, 470 N.W.2d 613, 615 (N.D. 1991) (holding that claimant's "physical condition or personal habits which made him more prone to heart disease is not reason for denying a claim if the preponderance of the evidence indicates that the heart attack was causally related to the employment, with reasonable medical certainty and was precipitated by unusual stress").

128. *Nelson*, 316 N.W.2d at 796. The court observed that the connecting of hoses by the decedent to his truck did not support a finding that the heart attack was caused by unusual physical stress. *Id.*

129. *Id.*

130. *Id.* at 797. The *Nelson* court held that the claimant had failed to meet the burden of proof required to participate in workers compensation benefits, stating that:

[C]lose questions involving emotional stress are inevitable when, instead of colorful triggering events, the employment contribution takes the form of a more protracted burden of worry, overwork, frustration, guilt, tension, or apprehension over losing one's job.

*Id.* (quoting LARSON, THE LAW OF WORKMEN'S COMPENSATION § 38.65(C), at 7-202). The North Dakota Supreme Court reached a similar result in *Ganske v. North Dakota Workmen's Compensation Bureau*, 355 N.W.2d 800 (N.D. 1984). In *Ganske*, the court denied compensation to the claimant, a cook, who had felt stress prior to suffering a heart attack. *Id.* at 802. The court held that the evidence of unusual stress was "scanty at best," and insufficient to establish the existence of unusual stress. *Id.* at 803.

131. *Nelson*, 316 N.W.2d at 796-97.

132. *Id.* at 797.

133. See *Grace v. North Dakota Workmen's Compensation Bureau*, 395 N.W.2d 576 (N.D. 1986). See also *Christianson v. North Dakota Workers' Compensation Bureau*, 470

men's Compensation Bureau,<sup>134</sup> the claimant argued for benefits after suffering a heart attack while working as a masonry foreman in temperatures approaching 120 degrees.<sup>135</sup> The claimant also suffered emotional stress caused by pressures to complete a construction project on schedule.<sup>136</sup> Additional stress to the claimant was caused by dangerous working conditions that suspended work on several occasions.<sup>137</sup> The Workers' Compensation Bureau denied compensation, holding there was "no evidence of unusual stress or strain."<sup>138</sup> Holding that there was insufficient evidence to set aside the Bureau's decision, the district court and the North Dakota Supreme Court affirmed.<sup>139</sup> In a strong dissent, Justice Meschke noted that there was "clearly evidence of unusual stress" that had been ignored by the Workers' Compensation Bureau.<sup>140</sup>

In affirming the Bureau's decision, the court reiterated the limited standard of review that is applied to Bureau decisions: "[W]e do not make independent findings of fact, but ask only whether or not a reasoning mind reasonably could have determined [that the claimant's heart attack] was not precipitated by

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N.W.2d 613 (N.D. 1991). The claimant in *Christianson*, a small business owner, suffered a heart attack during a time period when he was experiencing business-related financial difficulties. *Id.* at 616. The claimant was overweight, smoked heavily and suffered from "mild hypertension." *Id.* at 615-16. The North Dakota Supreme Court denied compensation based on insufficient evidence to establish "unusual stress" and a sufficient causal relationship between the claimant's heart attack and work-related stress. *Id.* at 616. The requirements of unusual stress and reasonable medical certainty have been equally limiting in claims for heart attacks caused by physical rather than emotional stress. See *Schmalz v. North Dakota Workers' Compensation Bureau*, 449 N.W.2d 817, 823 (N.D. 1989) (denying compensation for claimant's heart attack which occurred in the presence of "toxic fumes"). See also *Kroh v. North Dakota Workers' Compensation Bureau*, 425 N.W.2d 899, 902 (N.D. 1988) (holding that claimant's expanded duties as a cook were insufficient to establish the existence of unusual stress).

134. 395 N.W.2d 576 (N.D. 1986).

135. *Grace v. North Dakota Workmen's Compensation Bureau*, 395 N.W.2d 576, 577 (N.D. 1986).

136. *Id.* at 583 (Meschke, J., dissenting). The claimant was in charge of a construction project that was behind schedule and further delay would have significantly increased his employer's expenses. *Id.* In addition the claimant had been recently unemployed and "[m]asonry jobs had been difficult to find." *Id.*

137. *Id.* The claimant was working directly underneath an "unsteady crane," creating a potentially dangerous work environment that suspended work on several occasions. *Id.*

138. *Grace*, 395 N.W. 2d at 583 (Meschke, J., dissenting). The North Dakota Workers' Compensation Bureau denied the claimant compensation, holding that "there is no medical substantiation that the claimant's heart attack was in any way related to his employment with reasonable medical certainty." *Id.* The Bureau further held "there was no evidence of unusual stress or strain." *Id.*

139. *Id.* at 582. In *Grace*, compensation was denied primarily because of a lack of evidence of unusual stress. *Id.* Both the district court and the North Dakota Supreme Court did not dispute that the claimant's heart attack was causally related to his employment. *Id.* at 583.

140. *Id.* at 583 (Meschke, J., dissenting). The dissent noted that the evidence did not support the findings of fact by the Bureau. *Id.* In his dissent, Justice Meschke stated that the Bureau failed to weigh the evidence of unusual stress and therefore the Bureau's "conclusions denying benefits are not properly supported by findings." *Id.* at 584.

unusual stress.”<sup>141</sup> Given this limited standard of review, claimants suffering compensable injuries could be denied recovery solely on the basis of an erroneous finding of fact by the Bureau as to the existence of unusual stress.

Thus, while mental-physical injuries are compensable in North Dakota, these claims when brought before the courts have been largely unsuccessful.<sup>142</sup> Legislative limitations imposed on mental-physical injuries in combination with a limited standard of review present a significant barrier to recovery for mental-physical claims in North Dakota.<sup>143</sup>

## V. MENTAL-MENTAL CLAIMS

### A. DEVELOPMENT

The largest increase in mental stress claims has occurred in claims involving no physical injury.<sup>144</sup> Claims for mental injuries caused by employment-related mental stress are the most recent and most controversial of the mental stress claims.<sup>145</sup> Employees are filing mental-mental claims in record numbers for conditions “ranging from job burnout, or mental fatigue from tedium and stress, to chronic and severe anxiety, manic depression, nervous breakdown and schizophrenia.”<sup>146</sup> Studies indicate that women file more stress claims than men and that the age of the average claimant is less than in other types of workers’ compensation cases.<sup>147</sup> The majority of stress claims involve white collar workers,<sup>148</sup> with higher paid managers and professionals “particularly susceptible to workplace stress.”<sup>149</sup>

The rising incidence of work-related stress claims reflects the changes that have taken place in our nation’s economy. While

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141. *Id.* at 583.

142. *See, e.g.*, *Grace v. North Dakota Workmen’s Compensation Bureau*, 395 N.W.2d 576, 582 (N.D. 1986) (finding that the claimant’s heart attack was not compensable although causally related to employment).

143. *See, e.g., id.*

144. 1B LARSON, *supra* note 1, § 42.25(a), at 7-957. According to Professor Larson, the number of mental-mental claims has exploded over the last 15 years. *Id.*

145. *See* 1B LARSON, *supra*, note 1, § 42.23, at 7-876. Unlike the other two categories of mental stress claims, the mental-mental claim has no physical component. *Id.*

146. *Headline: Record Numbers of Workers are Blaming Job Stress for Emotional Problems*, U.S. NEWS & WORLD REP., Mar. 24, 1986, at 76.

147. Donald DeCarlo, *Workers’ Compensation And Employers’ Liability Law: National Developments*, 25 TORT INS. L.J., at 521, 526 (1990). One possible reason for the disproportionate number of stress claims filed by women may be the emergence and recognition of sexual harassment in the workplace. *See, e.g.*, *Brown v. Alos Micrographics Corp.*, 540 N.Y.S.2d 911 (1989) (holding that anxiety caused by sexual harassment in the workplace was compensable).

148. 1B LARSON, *supra* note 1, § 42.25(a), at 7-958.

149. DeCarlo, *supra* note 147, at 527.

physical injury is the primary hazard faced by employees in "smoke stack industries," the computer age has placed unprecedented levels of psychological stress upon workers.<sup>150</sup> The increased automation and electronic monitoring of the work environment has increased stress levels by creating higher expectations with respect to the individual employee's speed and efficiency.<sup>151</sup>

Developing primarily in the last two decades,<sup>152</sup> mental-mental injuries are now recognized as compensable in a majority of states.<sup>153</sup> Mental-mental claims have been expressly rejected in

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150. *Headline: Record Numbers of Workers are Blaming Job Stress for Emotional Problems*, U.S. NEWS AND WORLD REP., Mar. 24, 1986, at 76. Stress experts agree that "the computer age is taking its toll in the form of psychological pressure and personal conflicts that stem from mental strain and boredom." *Id.*

151. DeCarlo, *supra* note 147, at 527.

152. 1B LARSON, *supra* note 1, § 42.25(a), at 7-958. With the exception of several federal decisions, successful mental-mental claims have occurred after 1970. *Id.*

153. 1B LARSON, *supra* note 1, § 42.23(c), at 7-927. See *Accord Fox v. Alascom Inc.*, 718 P.2d 977, 984 (Alaska 1986) (holding that a nervous breakdown caused by work-related stress was compensable); *Ron Brock v. Industrial Comm'n*, 486 P.2d 207, 207 (Ariz. Ct. App. 1971) (finding that the aggravation of a preexisting "depressive anxiety" resulting from a police investigation into a work-related accident was compensable); *Albertson's, Inc., v. Workers' Compensation App. Bd.*, 182 Cal. Rptr. 304, 307 (Ct. App. 1982) (holding that a traumatic experience was not required to show mental injury); *City of Aurora v. Industrial Comm'n*, 710 P.2d 1122, 1123 (Colo. Ct. App. 1985) (holding that employment-induced "post traumatic stress syndrome," absent physical injury, was compensable); *Battista v. Chrysler Corp.*, 517 A.2d 295, 298 (Del. Super. Ct. 1986) (holding that a mental injury caused by work-related verbal abuse was compensable); *O'Loughlin v. Circle A Constr.*, 739 P.2d 347, 349 (Idaho 1987) (holding that "panic disorder" caused by claimant's work-related blackout could be compensable); *Pathfinder Co. v. Industrial Comm'n*, 343 N.E.2d 913, 913 (Ill. 1976) (holding that mental injury from severe emotional shock traced to specific place and time was compensable); *Yocum v. Pierce*, 534 S.W.2d 796, 798 (Ky. 1976) (finding that a nervous break down, absent physical trauma, was compensable); *Sparks v. Tulane Medical Ctr. Hosp. & Clinic*, 546 So. 2d 138, 140 (La. 1989) (holding that mental injury resulting from threats and harassment was compensable); *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 208 (Me. 1983) (holding that mental injuries caused by ordinary work pressure were compensable); *Joseph Albanese's Case*, 389 N.E.2d 83, 86 (Mass. 1979) (holding that a mental disorder related to specific work-related stress was compensable); *Deziel v. Difco Labs., Inc.*, 268 N.W.2d 1, 13 (Mich. 1978) (holding that a mental injury believed by claimant to be work related was compensable); *Simon v. R.H.H. Steel Laundry*, 95 A.2d 446, (N.J. Super. Ct. 1953) (holding that mental injuries caused by explosion but unaccompanied by physical injury was compensable) *aff'd*, 98 A.2d 604 (N.J. Super. Ct. App. Div. 1953); *Candelaria v. General Elec. Co.*, 730 P.2d 470, 474 (N.M. Ct. App. 1986) (finding that mental injury caused by excitement, shock or emotional disturbance was compensable), *cert. denied*, 729 P.2d 1365 (N.M. 1986); *Brown v. Alos Micrographics Corp.*, 540 N.Y.S.2d 911, 912 (1989) (holding that anxiety caused by sexual harassment was compensable); *McGarrah v. State Accident Ins. Fund*, 651 P.2d 153, 161 (Or. App. 1982) (holding that mental injuries caused by work-related mental disorders were compensable), *aff'd*, 675 P.2d 159 (Or. 1983); *Hish v. Workmen's Compensation App. Bd.*, 513 A.2d 1147, 1150 (Pa. Commw. Ct. 1986) (holding that work-related mental illness could be compensable if causally related to employment); *Jose v. Equifax, Inc.*, 556 S.W.2d 82, 84 (Tenn. 1977) (holding that mental injury might satisfy the requirement of injury by accident); *Bailey v. American Gen. Ins. Co.*, 279 S.W.2d 315, 321-22 (Tex. 1955) (holding that mental injury from mental shock was compensable); *Breeden v. Workmen's Compensation Comm'r*, 285 S.E.2d 398, 401 (W. Va. 1981) (holding that mental injuries from work-related harassment were compensable); *International Harvester v. Labor & Indus. Review Comm'n*, 341 N.W.2d 721, 722-23 (Wis. Ct. App. 1983) (holding that mental injuries from the shock of seeing a co-worker burned were compensable); *Baker v. Wendy's*

a small number of states that have physical injury requirements for compensable injuries.<sup>154</sup>

Once mental-mental injuries are recognized by a state as potentially compensable, the issue of causation invariably arises.<sup>155</sup> Unlike the other mental stress claims, there is no physical element in mental-mental cases to aid in establishing either the cause or the extent of the mental injury.<sup>156</sup> This difficulty is compounded by the fact that mental injuries often result from mixed<sup>157</sup> or multiple causes.<sup>158</sup> In addition, certain mental disorders are extremely difficult to distinguish from malingering, further complicating mental-mental cases.<sup>159</sup> Finally, psychiatric opinions may contain inherent flaws not present in the medical opinions in

of Montana Inc., 687 P.2d 885, 891 (Wyo. 1984) (holding that nervous injury resulting from sexual advances was compensable).

154. 1B LARSON, *supra* note 1, § 42.25(d), at 7-963-64. Eight states, Florida, Georgia, Kansas, Minnesota, Montana, Ohio, and Oklahoma have expressly rejected the compensability of mental-mental injuries. *Id.*

155. See, e.g., Eric H. Marcus, *The Anatomy Of Litigation Involving Mental Distress*, 30 TRAUMA 2:14, 2:21 (1988). Dr. Marcus observes:

A distinction between psychiatry and clinical medicine is that psychiatry contains numerous "theories of causation," rather than widely accepted and scientifically validated origins of diseases. "Organic" psychiatrists' belief systems and clinical orientations vary. Some believe that psychiatric diseases are basically biochemical malfunctions. Others adhere to theories of early childhood traumatic events. Such widely divergent views of causation cast suspicion on psychiatric credibility.

*Id.*

156. 1B LARSON, *supra* note 1, § 42.23. See also Lawrence Joseph, *The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective*, 36 VAND. L. REV. 263, 289 (1983). "When an injury does not include a physical element . . . the policy issues underlying recovery for mental disorders—the genuineness of the injury and the genuineness of the causal relation between the employment and the disorder—become more apparent." *Id.*

157. 1 LARSON, *supra* note 18, § 7.40, at 3-14. "[M]ixed risks" occur when an employee's injury is caused by a "personal cause" and an "employment cause." *Id.* The general rule in "mixed risk" cases is that recovery is granted when the employment cause has contributed to the injury. *Id.*

158. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1987). The medical profession recognizes that the etiology for the majority of mental disorders is presently unknown. *Id.* at XXIII. Therefore, mental injuries are diagnosed on the basis of present manifestations, not previous cause. *Id.* See also Marilyn Cohen, Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 YALE L.J. 1129 (1961).

Unfortunately, the complex etiology of psychoneurosis and the demands of time for examination are such that in a substantial number of cases a psychiatrist will be unable to estimate with any degree of accuracy the probabilities of the injury occurring in the absence of employment. All major schools of psychoanalytic thought agree that although immediate factors of reality may serve as precipitating or exciting causes, the adult's predisposition towards a psychoneurotic reaction lies in the childhood.

*Id.* at 1142 (footnotes omitted).

159. 1B LARSON, *supra* note 1, § 42.24(b), at 7-949. Professor Larson notes that "malingering" and "compensation neurosis" are separated by a very fine line. *Id.* See also Eric H. Marcus, *The Anatomy Of Litigation Involving Mental Distress*, 30 TRAUMA 2:13, 2:40 (1988). In the detection of malingering, "[a] far better source of evidence concerning malingering and exaggeration is lay, rather than expert testimony." *Id.* "Information



other fields of medicine, creating legitimate questions with respect to the credibility and accuracy of psychiatric testimony.<sup>160</sup>

The states recognizing mental-mental claims can be divided into three groups based on the threshold barriers to recovery they have imposed for mental-mental injuries.<sup>161</sup> The level of coverage that is provided by a state directly reflects the state's willingness to compensate mental-mental injuries.<sup>162</sup> Group one compensates mental-mental injuries caused by gradual or ordinary stress.<sup>163</sup> Thus, a claimant's work-related mental-mental injuries are compensable even though the claimant has not been subjected to

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gathered from the observations of friends, neighbors and especially impartial witnesses can be much more credible evidence than evidence derived from experts." *Id.*

160. See also Eric H. Marcus, *The Anatomy Of Litigation Involving Mental Distress* 30 TRAUMA 2:13, 2:15 (1988). Dr. Marcus notes:

Courts tend to give psychiatric evidence the credibility of medical testimony without realizing that psychiatric opinions differ substantially from those in other medical specialties.

It has been advocated that psychiatric opinions be grounded on the bedrock of established psychiatric descriptive textbooks. This medical model of psychiatric disorders is based upon labeling and categorizing mental phenomena as "diseases." However, much has been written to indicate that mental phenomena do not function at all like physical diseases. Many "mental illnesses" are more accurately a product of the observer's labeling inclinations.

*Id.* at 2:14-15.

Every study where it has been possible to test the psychiatric conclusions against objectively determinable hard data shows that they have consistently been wrong more often than right . . . .

Based upon such dismal and embarrassing conclusions regarding psychiatric objectivity and validity, one wonders why psychiatric opinions are granted the benefit of "reasonable probability" or "reasonable medical certainty" in the courtroom. Until such time as psychiatry reaches the degree of predictability and credibility minimally required of a scientific discipline, the courts and insurance industry would do well to give "common sense" more, or at least as much, credence as "psychiatric expertise." Courts are becoming increasingly perceptive and critical of the data base upon which psychiatric opinions are derived. Accordingly, the objective or subjective nature of the psychiatrist's data base needs to be scrutinized.

*Id.* at 2:22. See also *Kuklok v. Workers' Compensation Bureau*, 492 N.W.2d 572, 574 (N.D. 1992) (recognizing the limitations of present scientific knowledge in respect to mental disorders resulting in inconsistent medical opinions).

161. 1B LARSON, *supra* note 1, § 42.25(b). In each of the three types of mental-mental coverage, claims are evaluated objectively. See *id.* *Contra* *Deziel v. Difco Lab., Inc.*, 268 N.W.2d 1 (Mich. 1978).

We hold, as a matter of law, that in cases involving mental (including psychoneurotic or psychotic) injuries, once a plaintiff is found disabled and a personal injury is established, it is sufficient that a strictly subjective causal nexus be utilized . . . to determine compensability. Under a "strictly subjective causal nexus" standard, a claimant is entitled to compensation if it is factually established that claimant honestly perceives some personal injury incurred during the ordinary work of his employment "caused" his disability.

*Id.* at 11. Following the court's decision in *Deziel*, the Michigan Legislature implemented an objective standard. 1B LARSON, *supra* note 1, § 42.23(d), at 7-931 n.18.

162. 1B LARSON, *supra* note 1, § 42.25(b), at 7-959.

163. *Id.* § 42.25(c), at 7-968 n.17. Alaska, California, Hawaii, Kentucky, Michigan, New Jersey, Oregon, Pennsylvania, and West Virginia award compensation for mental injuries resulting from gradual or ordinary stress. *Id.* at 7-968-69 n.17.

stress greater than that usually encountered in the profession.<sup>164</sup> In the second group, mental injuries must be precipitated by unusual stress.<sup>165</sup> States in this group require that the claimant, as a prerequisite to recovery, establish abnormal stress as the cause of their mental-mental injury.<sup>166</sup> The most restrictive coverage is provided by the third group, compensating mental-mental injuries only when injury is caused by sudden mental stimuli.<sup>167</sup> In group three, compensation for mental-mental injuries is only awarded when the injuries were caused by abnormal stress which can be traced to a specific place and time.<sup>168</sup>

## B. MENTAL-MENTAL CLAIMS IN NORTH DAKOTA

### 1. *Statutory Law*

The compensability of mental-mental injuries is statutorily prescribed in North Dakota.<sup>169</sup> The state's definition of "compensable injury" was amended in 1989 to include mental injuries caused by mental stimuli.<sup>170</sup> This amendment both clarified and modernized North Dakota's definition of compensable injury.<sup>171</sup> The legislative intent of the 1989 amendment was to provide compensation for mental-mental claims subject to the limitations of "unusual stress" and "reasonable medical certainty" applied in heart attack and stroke cases.<sup>172</sup> Therefore, to recover benefits for

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164. See *Wade v. Anchorage Sch. Dist.*, 741 P.2d 634, 638 (Alaska 1987) (rejecting the requirement of a showing of stress greater than that normally found in the claimant's occupation).

165. 1B LARSON, *supra* note 1, § 42.25(f), at 7-966. Arizona, Arkansas, Colorado, Illinois, Maine, Massachusetts, New York, Oregon, Rhode Island, South Carolina, Washington, Wisconsin, and Wyoming require unusual stress as a prerequisite to the compensability of mental-mental injuries. *Id.* at 7-966-68 n.16. Although the issue of the compensability of mental-mental injuries has not been addressed, unusual stress is a prerequisite to recovery in North Dakota. N.D. CENT. CODE § 65-01-02(8)(a)(3) (Supp. 1991) (finding that injuries resulting from mental stimuli must be precipitated by unusual stress).

166. See, e.g., *Fireman's Fund Ins. Co. v. Industrial Comm'n*, 579 P.2d 555 (Ariz. 1978) (holding that claimant's nervous breakdown caused by increasing stress resulting from increased work volume was compensable).

167. 1B LARSON, *supra* note 1, § 44.25(e), at 7-964-65. Illinois, Louisiana, Maryland, Mississippi, Texas, Virginia, and Washington require sudden stimulus in mental-mental cases. *Id.* at 7-964-65 n.11.

168. See, e.g., *Jose v. Equifax, Inc.*, 556 S.W.2d 82, 84 (Tenn. 1977) (holding that sudden stimulus includes "fright, shock or even excessive unexpected anxiety").

169. N.D. CENT. CODE § 65-01-02(8)(a)(3) (Supp. 1991). See *supra* note 36 and accompanying text.

170. 1989 N.D. Laws ch. 765, § 1 (codified at N.D. CENT. CODE § 65-01-02(8)(a)(3) (Supp. 1991)).

171. N.D. STANDING COMM. MINUTES, S.B.2256, Jan. 24, 1989. The 1989 amendments were in direct response to a dramatic increase in the number of mental injury claims filed and were designed to clarify coverage and limit litigation. See *id.* (testimony of Pat Meyer, Assistant Claims/Rehabilitation Manager, North Dakota Workers' Compensation Bureau).

172. *Id.* (testimony of Dean Haas, Assistant Attorney General).

mental-mental injuries, claimants must prove their injuries were "precipitated by unusual stress."<sup>173</sup> Claimants must also establish a causal relationship between their mental injury and their employment with "reasonable medical certainty."<sup>174</sup> Mental injuries arising out of a "bona fide personnel action" are not compensable except when such action is the "intentional infliction of emotional harm."<sup>175</sup>

While the legislature has recognized the compensability of mental-mental injuries, the North Dakota Supreme Court has not yet considered the issue.<sup>176</sup> The court has, however, in related decisions, commented on the compensability of mental-mental injuries.<sup>177</sup>

*In Choukalos v. North Dakota Workers' Compensation*

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Subsection 3 on page 5 contains the current language which requires a worker to establish unusual stress in claims for heart attack or stroke. The subsection expands this requirement to claims of mental injury induced by mental stress . . . . The rationale for the unusual stress rule is to require that the work be a true stressor before benefits are paid. If an individual with substantial pre-existing emotional problems perceives normal working conditions as stressful, and cannot continue working, many psychiatrists will term this an adjustment action to the work, thereby drawing a cause and effect relationship between the normal work activities and the psychiatric disability. An unusual stress rule will still allow a worker to claim benefits, but will require the worker to show something more than ordinary work activities caused the psychiatric disability.

*Id.* (testimony of Dean Haas, Assistant Attorney General). The requirement of unusual stress serves two interests. First, workers are compensated on a limited basis for mental-mental injuries. *Id.* In addition, workers' compensation is not overburdened with meritless claims and forced to act as a "universal insurer." *Id.*

173. N.D. CENT. CODE § 65-01-02(8)(a)(3) (Supp. 1991). See *supra* note 36 and accompanying text. When originally introduced, this section required mental injuries to be "precipitated by unusual stress, objectively viewed." *Darnell v. North Dakota Workers' Compensation Bureau*, 450 N.W.2d 721, 724 n.3 (N.D. 1990). While the "objectively viewed" language was deleted, the requirement of unusual stress has been interpreted in North Dakota as an objective standard that is applied individually to each worker based on his or her previous work history. See *supra* note 114 and accompanying text.

174. N.D. CENT. CODE § 65-01-02(8)(a)(3) (Supp. 1991). See *supra* notes 109, 112, 116, 117 and accompanying text (outlining the requirements of unusual stress and reasonable medical certainty).

175. N.D. CENT. CODE § 65-01-02(8)(b)(9) (Supp. 1991). This section provides that "[a] mental or emotional injury arising principally out of a bona fide personnel action, including a transfer, promotion, demotion, or termination except such action that is an intentional infliction of emotional harm" is not compensable. *Id.* This section is a legislative affirmation and expansion of the North Dakota State Supreme Court's decision in *Choukalos v. Workers' Compensation Bureau*, 427 N.W.2d 344, 346 (N.D. 1988), denying benefits due to stress from the termination of employment. N.D. STANDING COMM. MINUTES S.B. 2256, Jan. 24, 1989 (testimony of Dean Haas, Assistant Attorney General). The *Choukalos* court held that "[b]ecause Workers' Compensation benefits are not available for mental injury resulting from termination of employment, an employee whose employment has been terminated can pursue other remedies." *Choukalos*, 427 N.W.2d at 346 (citing *Georgia-Pacific Corp. v. Workers' Compensation Appeals Bd.*, 192 Cal. Rptr. 643 (Ct. App. 1983)).

176. *Darnell v. North Dakota Workers' Compensation Bureau*, 450 N.W.2d 721, 725 (N.D. 1990) (noting that the issue of the compensability of mental-mental claims has not yet been considered).

177. See *id.*

*Bureau*,<sup>178</sup> the claimant filed for workers' compensation benefits for mental injuries resulting from the termination of his employment.<sup>179</sup> Following the termination, the claimant became "agitated and depressed."<sup>180</sup> At trial, medical experts testified that the claimant's "termination from employment 'was a substantial contributing factor to the claimant's mental functioning' and 'was a precipitating event in the claimant's acute mental state.'"<sup>181</sup> The North Dakota Supreme Court upheld the Bureau's denial of compensation, holding that mental injuries resulting from the termination of employment are not compensable.<sup>182</sup> However, the court noted that since workers' compensation benefits are unavailable for termination-related mental injuries, other traditional tort remedies may be pursued by the claimant.<sup>183</sup> Therefore, absent tortious conduct, employers remain free to implement personnel decisions without the potential threat of liability for mental stress claims.<sup>184</sup>

In a more recent case, the claimant sought recovery after suffering a relapse into alcoholism following a poor work evaluation.<sup>185</sup> The claimant, a prison guard, received an employment evaluation from his supervisor that rated his work performance as poor.<sup>186</sup> After receiving the evaluation, the claimant "drank three

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178. 427 N.W.2d 344 (N.D. 1988).

179. *Choukalos v. North Dakota Workers' Compensation Bureau*, 427 N.W.2d 344, 345 (N.D. 1988).

180. *Id.*

181. *Id.* The Workers' Compensation Bureau conceded that the claimant's mental injuries were caused by an underlying mental condition that had been triggered by employment. *Id.*

182. *Id.* at 346. Writing for the majority, Justice Levine stated:

The workers' compensation statutes were enacted to protect workers from the hazards of employment. Absent a clear legislative statement, we do not believe that the Legislature intended the workers' compensation statutes to protect workers from the hazard of termination of employment. Thus, we do not believe that a mental injury resulting from termination of employment was intended by the Legislature to constitute a compensable injury.

*Id.* The 1989 amendments to section 65-01-02(8)(b)(9) represent the legislature's affirmation of the court's decision in *Choukalos*. See N.D. CENT. CODE § 65-01-02(8)(b)(9) (Supp. 1991). The holding of *Choukalos* was expanded by statute to include mental injuries resulting from transfer and promotion. *Id.* While the language of section 65-01-02(8)(b)(9) may suggest that intentional tortious acts are covered by workers' compensation, that interpretation of the statute would violate the express intent of the legislature as well as the holding in *Choukalos*. *Id.*

183. *Choukalos*, 427 N.W.2d at 346 (citing *Georgia-Pacific Corp., v. Workers' Compensation Appeals Bd.*, 192 Cal. Rptr. 643 (Ct. App. 1983)).

184. See *supra* note 175 and accompanying text (stating that mental injuries resulting from personnel decisions are not compensable).

185. *Darnell v. North Dakota Workers' Compensation Bureau*, 450 N.W.2d 721, 722 (N.D. 1990). In *Darnell*, the claimant contended that job depression and stress in conjunction with a poor employment evaluation triggered his alcoholism. *Id.*

186. *Id.* The evaluation stated that the claimant was prone to making mistakes and that his work was not reliable. *Id.*

quarts of whiskey" and, as a result, was hospitalized.<sup>187</sup> The claimant was diagnosed as suffering from "psuedoseizures and depression."<sup>188</sup> The claimant testified that it was his honest belief that the "stress of his employment substantially contributed to and triggered his pre-existing, asymptomatic alcoholism."<sup>189</sup> The Supreme Court of North Dakota denied compensation, holding that the claimant's subjective beliefs were insufficient to establish a causal relationship between the claimant's alcoholism and his employment.<sup>190</sup> In passing on the issue of mental-mental claims, the court noted the difficulty in establishing a causal relationship in mental-mental cases.<sup>191</sup> The court also observed that "[t]he cautiousness used in evaluating [mental-mental] injuries is reflected by the different threshold standards utilized [by the different states] before those types of claims are compensable."<sup>192</sup>

## 2. Policy

Compelling policy arguments favor the recognition of mental-mental injuries as compensable.<sup>193</sup> Regardless of origin, mental injuries can be as disabling as the most severe physical injuries.<sup>194</sup> In addition, advances in the medical profession have provided reliable objective procedures for the diagnosis of mental injuries.<sup>195</sup>

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187. *Id.*

188. *Id.*

189. *Darnell*, 450 N.W.2d at 724.

190. *Id.* at 727. The *Darnell* court refused to apply a subjective test for causation. *Id.* at 725. The court, in its reasoning, discussed the subjective test for causation, stating:

We note that the subjective causal nexus test relied upon by Harold and adopted in *Dezeil v. Difco Laboratories, Inc.*, *supra*, has been frequently criticized and rarely followed because it "ignores the nature of neurotic disabilities which seek to fasten blame for unresolved inner conflicts on any convenient scapegoat such as one's employer" and fosters the conclusion that trivial employment injuries should be "permitted to act as a 'hook' on which neurotics can hang their troubles."

*Id.* at n.6 (quoting Thomas Cook, *Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application*, 62 NOTRE DAME L. REV. 879, 907 (1986-87)).

191. *Darnell*, 450 N.W.2d at 725. "This court has recognized the difficulty involved with independent claims for infliction of emotional distress in the law of torts." *Id.* at n.5 (citing *Muchow v. Lindblad*, 435 N.W.2d 918 (N.D. 1989)). See also *Muchow v. Lindblad*, 435 N.W.2d at 920 (N.D. 1989) (observing that claims for "emotional distress have troubled courts because emotional distress may be real and serious in some situations, while trivial, feigned, or imagined in others"). The *Darnell* court also noted the difficulties that arise with causation in mental-mental cases. *Darnell*, 450 N.W.2d at 725 n.5 (citing *McGarrah v. State Accident. Ins. Fund*, 675 P.2d 159 (Or. 1983) (finding that mental-mental injuries are one of the most complex issues in workers' compensation)).

192. *Darnell*, 425 N.W.2d at 725 n.5.

193. 1B LARSON, *supra* note 1, § 42.23(a), at 7-905-06.

194. See, e.g., *Lyson v. Workmen's Compensation Bureau*, 129 N.W.2d 351, 354 (N.D. 1964). "Neuroses, emotional disturbances, and mental illnesses can be as disabling as the most serious of physical injuries . . ." *Id.*

195. See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. 1987); 1B LARSON, *supra* note 1, § 42.23(a), at 7-

Furthermore, refusing to award benefits to an employee who has suffered a mental injury as a direct result of her employment violates the purpose<sup>196</sup> and intent<sup>197</sup> of workers' compensation in North Dakota. The once acceptable distinction between mental and physical injuries is arbitrary and unsupported by either "legal or medical theory."<sup>198</sup>

While public policy mandates that mental-mental injuries be compensable, the integrity and viability of workers' compensation systems are dependent upon the placing of threshold limitations upon those claims. In the small minority of states that do not impose threshold limitations on mental-mental claims,<sup>199</sup> workers' compensation has been grossly abused by claimants, physicians and lawyers.<sup>200</sup> Claimants in these states are encouraged through

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906. *Contra* Eric H. Marcus, *The Anatomy Of Litigation Involving Mental Distress*, 30 TRAUMA 2:13, 2:21 (1988). Numerous potential problems are created by the reliance on the "Diagnostic and Statistical Manual of Mental Disorders" in workers' compensation litigation. *Id.*

In light of these constant revisions in the descriptions of psychiatric conditions, courts need to bear in mind the potential pitfalls of accepting a "current" psychiatric diagnosis at face value.

Furthermore, since so-called "official" psychiatric diagnoses are subject to considerable controversy, especially when utilized in litigation contexts, a quote in regard to the usage of official psychiatric diagnoses is critical:

"DSM-III is a clinical manual that is not directly translatable into legal language. It is not intended for use in clarifying legal issues. The American Academy of Psychiatry and the Law recommends that a disclaimer be inserted in DSM-III to prevent its misuse in forensic settings."

*Id.*

196. *See supra* note 26 and accompanying text (providing the purpose of workers' compensation).

197. *See supra* note 36 and accompanying text (showing that the legislature intended that mental-mental injuries be compensable). In addition, workers' compensation statutes are to be liberally construed and broadly applied. *See supra* notes 27 and accompanying text.

198. 1B LARSON, *supra* note 1, § 42.23(a), at 7-906. Professor Larson notes:

Perhaps in earlier years, when much less was known about mental and nervous injuries and their relation to "physical" symptoms and behavior, there was an excuse, on grounds of evidentiary difficulties, for ruling out recoveries based on such injuries, both in tort and in workmen's compensation. But the excuse no longer exists.

*Id.*

199. *See supra* note 163 and accompanying text (listing the states that do not impose threshold restrictions on recovery for mental-mental claims).

200. Rita Maroney McPeake, *Workers' Compensation*, 335 PRACT. LAW INST., 401 (1992). In California, the explosion of mental-mental claims has reached crisis proportions. *Id.* The media is filled with advertisements targeted at workers who may feel that their work is too demanding and that encourage workers to file claims independent of whether they have actually suffered an injury. *Id.* California has become riddled with "[w]orkers' compensation 'mills'" that find a stress-related disability for nearly everyone who walks through their doors. *Id.* Claimants are encouraged to file claims and then bill the insurer with inflated medical charges as a means of forcing settlement. *Id.* *See also* Eric H. Marcus, *The Anatomy Of Litigation Involving Mental Distress*, 30 TRAUMA 2:13, 2:30 (1988) (reporting that health professionals are predisposed to finding something wrong with patients based upon "humanitarian" and "economic" bias).

advertisements by lawyers and physicians to seek workers' compensation benefits regardless of whether the claimant has suffered a real injury.<sup>201</sup>

Thus, the issue of the compensability of mental-mental injuries requires the balancing of a state's desire to promote prosperity through the compensation of its workers for work related injuries against the potential for abuse in the workers' compensation system.<sup>202</sup> While it remains clear that mental-mental injuries should be compensable, it is equally clear that compensation for these types of claims should be subjected to some threshold limitation to ensure the validity of the claims.

## VI. CONCLUSION

All three categories of mental stress claims physical-mental, mental-physical and mental-mental are compensable under North Dakota Workers' Compensation statutes.<sup>203</sup> While only physical-mental and mental-physical claims have been recognized by the North Dakota Supreme Court, it appears certain that upon future consideration the court may find mental-mental injuries compensable.<sup>204</sup> Providing compensation for workers who suffer employment caused mental-mental injuries is supported by strong policy arguments and is consistent with the North Dakota Supreme Court's previous application of workers' compensation statutes in this state.<sup>205</sup>

The recovery for mental-mental injuries will, however, be subject to the same limitations imposed by the legislature on mental-physical injuries.<sup>206</sup> The requirements of "unusual stress" and "reasonable medical certainty" represent a statutory compro-

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201. *Id.* See Murial Dobbin, *Record Numbers of Workers are Blaming Job Stress for Emotional Problems*, U.S. NEWS & WORLD REP., Mar. 24, 1986, at 76 (asserting the liberal compensation of mental-mental injuries without threshold limitations "invites litigation").

202. See *supra* notes 163-68 and accompanying text (outlining the various threshold limitations that states impose before compensating mental-mental injuries).

203. See *supra* note 36 and accompanying text (noting that workers' compensation statutes require unusual stress for injuries from mental stimulus).

204. See *supra* notes 197-98 and accompanying text (providing the rationale for compensating mental-mental injuries).

205. See *supra* note 106 and accompanying text (following a liberal plain meaning approach in the application of workers' compensation statutes).

206. N.D. STANDING COMM. MINUTES, S.B. 2256, Jan. 24, 1989. Because of the problems inherent in the testimony of mental stress experts, the establishment of "reasonable medical certainty" and "unusual stress" will be especially burdensome to claimants seeking relief for mental-mental injuries. See *supra* notes 158, 160 and accompanying text. While it appears certain that the North Dakota Supreme Court will recognize the compensability of mental-mental claims, the success rate for mental-mental claims brought before the courts will be predictably lower than the dismal success rate enjoyed by mental-physical claims. See *supra* note 123 and accompanying text.

mise where the benefits available to workers are limited in exchange for guarantees of legitimacy as to the cause and extent of the worker's injury.<sup>207</sup>

These requirements, combined with the limited standard of review that is applied to Bureau decisions, present a significant barrier to recovery for mentally stimulated injuries virtually eliminating the potential for system abuse.<sup>208</sup> Therefore, to avoid burdening injured workers with the cost of mentally stimulated industrial accidents, it is imperative that section 65-01-02(8)(a)(3) of the North Dakota Century Code be applied liberally and broadly in the tradition of workers' compensation in North Dakota.<sup>209</sup>

*Kurt Lamp*

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207. *Id.*

208. *See supra* notes 109-16 and accompanying text (outlining the elements of unusual stress and reasonable medical certainty required for a compensable mental-mental injury).

209. *See supra* note 27 and accompanying text (noting that workers' compensation statutes are interpreted liberally).



